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No. ~~107~~ /

In the Supreme Court of the United States

OCTOBER TERM, 1949

STANDARD OIL COMPANY, PETITIONER

v.

FEDERAL TRADE COMMISSION

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE FEDERAL TRADE COMMISSION

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BRIEF FOR FEDERAL TRADE COMMISSION[1]

OPINION

The opinion of the Court of Appeals for the Seventh Circuit was issued March 11, 1949 (R. 5293) and is reported in 173 F. 2d 210.

JURISDICTION

The decree of the Court of Appeals was entered on April 29, 1949 (R. 5307). The petition for a writ of certiorari was filed June 9, 1949, and was allowed on November 7, 1949. The jurisdiction of this Court is invoked under Title 28, United States Code, Section 1254 (1).

[1] Commissioner Lowell B. Mason dissents.

STATUTE INVOLVED

Section 2 of the Clayton Act, 38 Stat. 730, as amended by the Robinson-Patman Act (Act of October 15, 1914, as amended by Act of June 19, 1936), 49 Stat. 1526; 15 U. S. C. 13, provides in part:

> (a) That it shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, where either or any of the purchases involved in such discrimination are in commerce * * * where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them * * *.
>
> (b) Upon proof being made, at any hearing on a complaint under this section, that there has been discrimination in price or services or facilities furnished, the burden of rebutting the prima facie case thus made by showing justification shall be upon the person charged with a violation of this section, and unless justification shall be affirmatively shown, the Commission is authorized to issue an order terminating the discrimination; *Provided, however,* That nothing herein contained shall prevent a

seller rebutting the prima facie case thus made by showing that his lower price or the furnishing of services or facilities to any purchaser or purchasers was made in good faith to meet an equally low price of a competitor, or the services or facilities furnished by a competitor.

QUESTIONS PRESENTED

1. Whether good faith to meet an equally low price of a competitor under Section 2 (b) of the Clayton Act, as amended, is a justification for discriminations in price which have the injurious effects on competition specified in Section 2 (a) of the Act.

2. Whether Sections 2 (a) and 2 (b) of the Clayton Act, as amended, meet all requirements of Constitutional due process when construed as not making good faith to meet an equally low price of a competitor an absolute justification for price discriminations which injure or destroy competition or which tend to create monopoly.

3. Whether Paragraph Six of the Commission's order is necessary and appropriate for effective relief against petitioner's unlawful price discriminations.

4. Whether petitioner's discriminations in price against which the Commission's order is directed were discriminations in the course of commerce among the several States under Section 2 (a) of the Clayton Act, as amended.

STATEMENT

In this proceeding under Section 11 of the Clayton Act, 15 U. S. C. 21, the Federal Trade Commission charged petitioner with discriminating in price between different purchasers of products of like grade and quality in violation of Section 2 (a) of that Act, as amended by the Robinson-Patman Act, 49 Stat. 1526; 16 U. S. C. 13 (R. 2–5, 34–36). After hearing, the Commission made findings of fact (R. 5161), entered an order to cease and desist (R. 5183), and subsequently a modified order to cease and desist (R. 5254). Thereafter, respondent filed in the Court below a petition to review the Commission's final order (R. 5270), and the Commission filed a cross-petition for its enforcement (R. 5280). The Court below modified Paragraph 6 of the Commission's final order (R. 5305) and entered a decree affirming and enforcing the order as modified (R. 5307).

The findings of the Commission, together with certain supplementary facts established by uncontradicted evidence and pertinent to the issues now before this Court, may be summarized as follows:

The petitioner, Standard Oil Company of Indiana, an Indiana corporation, with its principal office and place of business located in Chicago, Illinois, is engaged in the business of refining and distributing gasoline and other petroleum prod-

ucts throughout fourteen States, principally in the Middle West. Among others, petitioner has a refinery at Whiting, Indiana, to which it supplies crude oil from fields located in other States. One of twenty-seven divisions of the territory in which it distributes its products is known as the Detroit Field, which embraces some thirteen counties in Southern Michigan, including the City of Detroit. The Detroit Area, as distinguished from the Detroit Field, is confined to the City of Detroit and its suburbs. The petitioner has no refinery in Michigan and almost all of the gasoline it sells and distributes in the Detroit Field is transported by tankers from its refinery at Whiting through the Great Lakes to the petitioner's marine terminal at River Rouge in the outskirts of Detroit. This terminal has a storage capacity of about 63,000,000 gallons. During the Summer months, deliveries are made from Whiting weekly and sometimes twice weekly. In the Fall, sufficient gasoline is delivered and stored to take care of the estimated requirements during the Winter months when navigation on the Great Lakes is closed. The amount of gasoline used in Detroit is fairly constant and can be accurately estimated. During the years from 1936 through 1940, the years here in question, the petitioner supplied 16.2 percent to 17.4 percent of all the gasoline in the Detroit Area. In addition to the River Rouge tanks, the petitioner operated six bulk plants in the Detroit Area. Practically all

of the gasoline sold in the Detroit Area passed through the River Rouge terminal, except that in some instances gasoline was delivered directly from Whiting by truck and also by the same means to commercial users. Deliveries were made from the River Rouge terminal by tank cars and tank trucks up to February 1, 1940, and thereafter by trucks alone. The delivery trucks were owned and operated or leased and operated by the petitioner through its employees. (Paragraphs 1, 2, and 3 of the Commission's findings; R. 5162–5.)

Prior to September 10, 1936, petitioner operated all retail service stations owned or leased by it in the Detroit Metropolitan Area, but on that date, it discontinued all retail operations and leased or sublet all stations owned or leased by it to independent operators. Since September 10, 1936, the petitioner supplied gasoline to approximately 358 retail service stations, approximately 200 of which the petitioner owned and leased and 8 of which it leased and subleased. The remaining 150 were operated by independent operators who owned or leased their stations from some one else. The latter had an agreement to purchase their entire requirements of gasoline only from the petitioner (Com. Ex. 2; R. 2090). While the former had no such agreements, they did not buy gasoline from any one except the petitioner (R. 2092). The delivery to

the retail customers was known as "tank-wagon delivery" and was made at a price fixed in Chicago by the petitioner from time to time, known in the trade as the "posted tank-wagon price."

The petitioner also supplied gasoline in the Detroit Area to four dealers: Ned's Auto Supply Company, Citrin-Kolb Oil Company, Stikeman Oil Company, Inc., and Wayne Oil Company, hereinafter sometimes referred to as Ned's, Citrin, Stikeman, and Wayne.

Ned's Auto Supply Company was engaged exclusively in the retail sale of petitioner's gasoline direct to the consuming public through its own chain of service stations. Prior to September 1, 1936, Ned's negotiated with petitioner at its Chicago office and demanded that petitioner allow it a discount in the price of gasoline purchased, with a threat to take its business to another supplier. (R. 1813–5, 1989.) Thereupon, in the course and conduct of its business during the period from September 1, 1936, to March 7, 1938, the petitioner discriminated in price by selling its gasoline for resale direct to the purchasing public to Ned's at ½ cent a gallon lower than the price charged by petitioner for gasoline of the same grade and quality to other retail dealers in the Detroit Area. (Paragraph 6 of the Commission's findings; R. 5167–8.) Although Ned's was engaged exclusively in the retail sale of petitioner's gasoline, petitioner, nevertheless, on March 7, 1938, classified it as a

"jobber" in the Detroit Area.[2] And in the course and conduct of its business since March 7, 1938, the petitioner has discriminated in price by selling its gasoline for resale direct to the purchasing public to Ned's at 1½ cents a gallon lower than the price charged by the petitioner for gasoline of the same grade and quality to other retailers, customers of petitioner and competitors of Ned's, in the Detroit Area.[3]

Since June 19, 1936, Ned's has owned and operated in the Detroit Area a chain of retail

[2] This classification of Ned's as a "jobber" appears arbitrary since the record discloses that petitioner has refused permission to other retail service-station operators to buy in tank-car quantities (R. 83–4); the petitioner would not permit a group of retail dealers to pool their requirements and purchase in tank-car quantities, using joint storage facilities (R. 2080–1); tank-car capacities are 6,500 to 12,000 gallons (R. 512); one retail service-station operator, having a storage capacity of 16,000 gallons at his station, applied to petitioner in 1938 for deliveries in tank-car quantities at tank-car prices, but was refused (R. 807–16); another retailer, selling a volume of about 350,000 gallons of gasoline a year at his two stations, although he could have obtained bulk storage, was refused tank-car delivery and prices by petitioner (R. 3584); bulk storage and hauling facilities could be secured by any retail service-station operator or operators if permitted to purchase from petitioner on a tank-car basis; and there are a number of transportation companies in Detroit, who make a business of hauling gasoline for hire (R. 524, 1575).

[3] The petitioner's Red Crown gasoline, its largest selling brand, comprising 90 percent of its sales in the Detroit Area, was sold to Ned's since March 7, 1938, at 1½¢ a gallon lower than the price charged by petitioner for gasoline of the same grade and quality to other retailers in the Detroit Area. (Paragraphs 2 and 4 of the Commission's findings; R. 5162–5.)

gasoline service stations where the petitioner's gasoline so purchased has been resold at retail to consumers thereof in competition with other retailers of gasoline, purchasing from the petitioner or from other manufacturers. (Paragraph 4 of the Commission's findings; R. 5165.)

The volume of gasoline sold in the Detroit Area through retail gasoline stations is more or less constant, and fluctuations that occur are chiefly due to variation in the number of cars in use from year to year. A lower price at one service station than at another is an important factor in the purchasing public's mind, particularly when the difference in price occurs in the major brands of gasoline. Any difference in price between two stations selling the same gasoline, or major brands of gasoline, is very important in influencing the flow of business. The margin of profit of the retail service station operator between the tank-wagon price which he pays and the prevailing retail service station price on the regular brand of gasoline of the major companies is small. The retailer's margin between petitioner's posted tank-wagon price and prevailing retail selling price of its Red Crown gasoline has been only 3.3¢ a gallon in the Detroit Area since November 19, 1939. Consequently, any reduction allowed to a retail service station operator below the regular tank-wagon price gives such operator a material advantage over other

retail operators who pay the full tank-wagon price. (Paragraph 8 of the Commission's findings; R. 5168–71.)

In 1936, Ned's purchased 2,401,600 gallons of gasoline from petitioner which it resold to the public through its retail outlets or service stations. In 1937, Ned's was openly advertising cut prices, and was selling petitioner's Red Crown gasoline to the public at approximately 2¢ per gallon below the prevailing retail service station price, which continued with variations until the latter part of 1939. In 1937, the volume of gasoline sold by Ned's increased to 4,240,500 gallons. In 1939 and 1940, when Ned's posted price was approximately the same as the prevailing retail price, it gave various under-cover discounts and premiums. It has from time to time given commercial discounts varying from 1¢ to 2¢ per gallon off the posted price. In 1938, although the total volume of gasoline sold in the Detroit Area during that year was 10 percent less than the volume sold in 1937, the volume of gasoline sold by Ned's increased to 4,880,500. In 1938, Ned's had increased its retail service stations to five. (Paragraph 8 of the Commission's findings; R. 5168–71.) In 1939, Ned's also issued trading stamps with a value of 2¢ a gallon which were redeemable in merchandise or in gasoline at Ned's stores. In 1940, Ned's was operating six retail service stations. One other station, owned by Ned's, was operated for Ned's by an individ-

ual on a salary and commission basis. (Paragraph 5 of the Commission's findings; R. 5165–7.)

Price cutting at Ned's stations [4] has been almost

[4] The following table shows petitioner's posted tank-wagon price, its tank-car price, the prevailing retail service-station price, and Ned's posted price, for Red Crown gasoline, on each of various dates from 1937 to 1940, inclusive. This table is compiled from Commission's Exhibits 3 and 22, R. 4715–6; 4727, and testimony at pages 233–4–5. Prices shown are cents per gallon exclusive of all taxes. Taxes amounting to 4.4 cents a gallon are deducted from Ned's prices, which as stated in the record included taxes of approximately that amount. Many of the retail service station operators who testified as witnesses for the Commission stated that Ned's stations were the first Standard Oil stations to cut prices in their respective neighborhoods, and that in the Fall of 1937 and the Spring of 1938 they lost many customers who told them that they were buying their gasoline at Ned's because Ned's was giving them a discount of 2¢ a gallon. (Witnesses Leake, R. 407, Mertoglio, R. 416, Hawley, R. 429, Maloney, R. 451, Ruehle, R. 458, Tanski, R. 467, Tapert, R. 479, Christian, R. 409, Wotring, R. 575, Lefstad, R. 582, and Ferguson, R. 593.)

Date	Tank-wagon price	Tank-car price	Prevailing retail service station price	Ned's posted price
	Cents	*Cents*	*Cents*	*Cents*
Feb. 1, 1937	9.6	8.1	13.6	11.6
August 1937	9.9	8.4	14.1	12.1
January 1938	9.6	8.1	14.1	12.1
April 1938	9.8	8.3	14.3	12.1
June 1, 1938	9.8	8.3	13.8	12.3
July 1, 1938	9.8	8.3	12.3	12.3
August 1938	8.8	7.3	12.3	10.9
October 1938	8.8	7.3	12.1	10.6
Nov. 29, 1938	8.8	7.3	12.1	9.9
January 1939	7.6	6.35	10.0	9.9
March 1939	7.6	6.35	10.7	9.9
May 1939	7.6	6.1	10.7	9.9
July 1939	8.1	6.6	11.4	11.4
Nov. 1, 1939	7.4	6.15	9.3	9.1
Nov. 15, 1939	6.4	5.4	9.3	8.1
December 1939	8.1	6.6	11.4	11.3
July 1940	8.1	6.6	11.4	11.3

(Federal tax increased from 1 to 1½ cents per gallon July 1, 1940.)

continuous, and that company has been responsible for starting most of the retail price cutting in major brands of gasoline in Detroit over a period of several years. This practice on the part of Ned's has caused substantial damage to other retail service station operators selling the petitioner's Red Crown gasoline and to retail service station operators selling other brands of gasoline. The ability of Ned's to continue the price cutting practice was greatly enhanced through the low discriminatory price allowed it by petitioner while, at the same time, limiting other retailer-customers to a margin of profit of approximately 3.3¢ per gallon. (Paragraph 8 of the Commission's findings; R. 5168–71.)

The Commission found that the price discriminations granted by the petitioner to Ned's, both prior to March 7, 1938, and subsequent thereto, have given a substantial competitive advantage to Ned's over other retailers of gasoline, including retailer-customers of the petitioner; that this competitive advantage is capable of being used, and has been used, by Ned's to divert large amounts of business from other gasoline retailers to Ned's, including retailer-customers of the petitioner, with resultant injury to them and to their ability to continue in business and successfully compete with Ned's in the retailing of gasoline. The Commission further found that the effect of the discriminations in price allowed by the petitioner to

Ned's has been, and may be, substantially to lessen competition and to injure, destroy and prevent competition with Ned's in the retail sale of gasoline. (Paragraph 8 of the Commission's findings; R. 5168–71.)

During the period of time involved herein, Citrin, Stikeman, and Wayne were engaged in selling petitioner's gasoline at retail direct to the consuming public through ~~24 to 106~~ retail service stations owned and operated by them, as well as selling petitioner's gasoline at wholesale to other retailers, and, although these three favored dealers have, since June 19, 1936, owned or operated in the Detroit Area gasoline service stations where the petitioner's gasoline purchased by them has been resold at retail to consumers thereof in competition with other retailers of gasoline purchasing the same from the petitioner or from other manufacturers, the petitioner has nevertheless, classified these dealers as "jobbers."[5] (Paragraphs 3, 4, and 5, of the Commission's findings; R. 5164–7.)

In the course and conduct of its business since June 1936, the petitioner, in addition to the dis-

[5] In allowing "jobber" classification in the Detroit Area to these three dealers and to Ned's, the petitioner required only that they purchase substantial quantities of gasoline, own or control bulk plants where gasoline in large quantities could be delivered, and have sufficient financial standing or credit rating to warrant the extension of credit. There was no requirement that they would sell only at wholesale. (Paragraphs 3 and 5 of the Commission's findings; R. 5164–7.)

criminatory prices allowed to Ned's has also discriminated in price by selling its gasoline for resale direct to the purchasing public to Citrin, Strikeman, and Wayne at prices substantially lower than the prices charged by the petitioner for gasoline of the same grade and quality to other retailers in the Detroit Area. The petitioner's Red Crown gasoline, its largest selling brand, comprising 90 percent of its sales in the Detroit Area, was sold as aforesaid to these three jobbers at 1½¢ a gallon lower than the prices charged by the petitioner for gasoline of the same grade and quality to other retailers in the Detroit Area. (Paragraphs 2 and 4 of the Commission's findings; R. 5162–5).

During the period from January 1, 1938, to December 31, 1940, Citrin-Kolb Oil Company sold a million gallons of gasoline annually to Langer and Cohn (Lanco),[6] retail service station

[6] Commission's witnesses Branton (R. 521) and Ward (R. 529) testified that they lost customers to stations operated by Langer and Cohn during the period from 1936 to 1939, when these stations were giving discounts of 2¢ a gallon on Red Crown gasoline. Branton testified that the Lanco station near him put out advertising circulars advertising discounts on gasoline; and as late as 1941 gave premiums (R. 523–526).

Some of the dealer witnesses testified that certain stations operated by, or purchasing from Citrin started cutting their prices at about the same time or shortly after advertised price cutting was commenced by Ned's Auto Supply Company, and that these witnesses lost business which customers told them was due to the fact that they were able to buy below the prevailing retail price at the Citrin stations (Witnesses Tapert, R. 479, Branton, R. 521, Ward, R. 529, Richards, R. 537, and Ferguson, R. 593).

operators, at 1¢ per gallon less than petitioner's tank-wagon price and in addition sold another retail service station operator (located at 8501 Gratiot Street in Detroit, Com. Ex. 33, R. 4732–3) at ½¢ per gallon less than petitioner's tank-wagon price (Paragraphs 5 and 7 of the Commission's findings; R. 5166–8).

The Commission found that the price discriminations granted by the petitioner to Citrin, Stikeman and Wayne on gasoline sold by them at retail have given a substantial competitive advantage to these favored dealers in their retail operations over other retailers of gasoline, including retailer-customers of the petitioner; that this competitive advantage is capable of being used, and to some extent by Citrin, has been used to divert large amounts of business from other gasoline retailers, including customers of the petitioner, with resultant injury to them and to their ability to continue in business and successfully compete with said dealers in the retailing of gasoline. The Commission further found that the discriminations in price allowed to Citrin permitted this dealer to sell a million gallons of gasoline annually to one retailer-customer at a delivered price of 1¢ per gallon less than petitioner's posted tank-wagon price and to sell another customer at a discount of ½¢ per gallon less than petitioner's posted tank-wagon price; that Citrin, by passing on in part to Langer and Cohn (Lanco), the benefits of the discriminatory prices,

allowed by petitioner, enabled said Langer and Cohn to sell said gasoline to the consuming public at discounts of as much as 2¢ per gallon, which not only gave said Langer and Cohn a competitive advantage over other retailers of gasoline, including retailer-customers of petitioner, but also had the effect of diverting business from such retailers to said Langer and Cohn and of substantially lessening competition and injuring, destroying and preventing competition between said Langer and Cohn and other retailers of gasoline, including retailer-customers of petitioner. The Commission further found that the effect of the discriminations in price allowed by the petitioner to Citrin, Stikeman and Wayne has been, and may be, substantially to lessen competition and to injure, destroy and prevent competition with each of said dealers and with their respective customers in the retail sale of gasoline. (Paragraph 8 of the Commission's findings; R. 5168–71.)

SUMMARY OF ARGUMENT

I. The only question before this Court for its decision is the validity or invalidity of the Commission's order under existing law. Petitioner's contention that the "good faith" proviso of Section 2 (b) is an absolute substantive defense to a charge of violation of Section 2 (a) in any case as a matter of law is controverted by the legislative history as well as by the language of the proviso. The proposal that meeting competition

in good faith be made an absolute justification for a discrimination in price otherwise prohibited was considered and rejected by the Congress in the enactment of the Robinson-Patman Act. If this proviso were construed to permit the showing of a competing offer as an absolute bar to liability for discrimination, then it would nullify the Act entirely at the very inception of its enforcement; for in nearly every case, mass buyers receive similar discriminations from competing sellers of the same product. The Commission's construction and application of Sections 2 (a) and 2 (b) correctly and clearly demonstrate that where, as in the instant case, the adverse effects upon competition have been affirmatively established, proof of good faith in meeting an equally low price of a competitor under the proviso of Section 2 (b) does not constitute a substantive justification for the petitioner's discriminations in price. This is particularly true where, as in the instant case, the competition injured is retail competition between competing purchasers, since the fact that the seller acted in good faith to meet the price of the seller's competitor is not inconsistent with and does not logically rebut the proof that retail competition between competing purchasers is injured by the discrimination. This Court, in the *Staley* case, infra, p. 30, has expressed the view that the "good faith" proviso does not provide a substantive justification for violation of Section 2 (a) and that proof of meet-

ing competition in good faith is sufficient to rebut only a prima facie case of violation of Section 2 (a) and, beyond that, is merely evidence to be considered by the Commission with other evidence in determining as a question of fact in each case whether the seller's competition justified the discrimination in price.

II. The Commission's construction and application of Sections 2 (a) and 2 (b) meet all requirements of constitutional due process. Petitioner's argument that it has a constitutionally vested right to discriminate in price when meeting an equally low price of a competitor regardless of the injury done to competition is equivalent to a contention that the constitutional power of Congress to regulate commerce among the several States is limited by an inherent and inalienable private right to discriminate in price when done in good faith to meet an equally low price of a competitor. Section 2 (b) as thus construed by petitioner is elevated to the status of a constitutional guarantee. Petitioner's construction of this statute would make it ineffectual. The Court should adopt the Commission's construction that would make this statute an effective rather than an ineffective instrument for the protection of the competitive system against injurious discrimination. To accept petitioner's contentions would give constitutional sanction, under the circumstances here present, and which are of frequent occurrence, to discrimination which injures and

destroys competition or which tends to create monopoly. The effect of adopting the contention would be to make petitioner's economic philosophy a part of the Constitution. Rejecting it would simply recognize the constitutional right of Congress to deal with discrimination and the competitive devastation which so frequently characterizes it in the light of legislative and administrative experience.

III. The Commission's order in this case would be incomplete and possibly ineffective if it only prohibited petitioner from discriminating in price between competing retailers. The prohibition should necessarily extend to the selling of gasoline to any wholesaler in the Detroit Area who resells it to retailers at less than petitioner's posted tank-wagon price or who directly or indirectly grants to his retailer-customers any discounts, rebates, allowances, services or facilities having the net effect of a reduction in price to the retailer. If petitioner cannot sell to both tank-car resellers and tank-wagon resellers in the same territory at different prices without injuring competition with the tank-car resellers or with their customers, petitioner should abandon the practice of selling to both of these classes of customers in the same marketing area. As a practical matter, Paragraph Six will not prevent petitioner from continuing to sell to Detroit wholesalers in tank-car quantities at tank-car

prices. If petitioner notifies its three wholesaler customers that it will refuse to sell to them if they resell to retailers at less than the posted tank-wagon price, as petitioner may lawfully do, there can be little doubt that these wholesalers will comply. Since petitioner has chosen to engage in the dual method of operation in the Detroit Area, it must accept the responsibility and burden of seeing that the difference in the prices charged to its two classes of customers does not result in competitive injury. If it cannot do this, then it has the alternative of adopting the course followed by several of its competitors, of distributing its products in a single marketing area either through wholesalers or directly to retailers, but not by both methods.

IV. There is a practical continuity of movement of the petitioner's gasoline flowing through the Indiana refinery to petitioner's customers in Detroit, with no intermediate sales and with only such temporary physical interruptions to the flow as petitioner finds convenient for its own internal purposes as a corporation which distributes and sells its gasoline in fourteen states. The petitioner's storage tanks are merely the "throat" through which the "current of commerce" flowed from petitioner to its specific retailer customers in the State of Michigan. Petitioner's gasoline was transported in interstate commerce with the intention on the part of petitioner and its specific

customers, in advance of transportation, that such gasoline would be delivered to its specific customers. The retail gasoline service stations under contract and lease and the stations operated by the four favored dealers were the intended final destination of the greater portion of this gasoline. The modern concept of commerce is one which gives full sweep to the commerce clause of the Constitution within the limits of the implementing statute, a liberal view of the Congressional purpose as expressed in the statute, and a realistic view of what business is doing as it moves across state lines to accomplish its purpose.

ARGUMENT

I

GOOD FAITH TO MEET AN EQUALLY LOW PRICE OF A COMPETITOR UNDER SECTION 2 (b) OF THE CLAYTON ACT, AS AMENDED, IS NOT A JUSTIFICATION FOR DISCRIMINATIONS IN PRICE WHICH HAVE THE INJURIOUS EFFECTS ON COMPETITION SPECIFIED IN SECTION 2 (a) OF THE ACT.

At the outset, since counsel for petitioner have referred to the position of the Commission relative to certain proposed legislation,[7] now pending in the Congress, quoting on page 31 of petitioner's brief a statement of the Commission in its letter of June 9, 1949, to Congressman F. E. Walter, Chairman, Subcommittee of the House Committee on the Judiciary, it seems necessary to clarify the Commission's position upon the legis-

[7] S. 236, 81st Cong., 1st Sess. S. 1008, 81st Cong., 1st Sess.

lative question by quoting further from the same letter,[8] as follows:

> * * * It appears that there is some misunderstanding of the Commission's position on this matter. Therefore, the Commission has approved the following statement of its views. * * *
>
> The Commission does not object to the bill with the principle of the Kefauver amendments included therein, nor does it make elimination of these amendments a condition of its approval. * * *
>
> The amendments under discussion involve the question whether or not a price discrimination that injures competition is lawful if it is undertaken in good faith to meet the equally low price of a competitor. Without the Kefauver amendments, the bill would make good faith in such a discrimination a complete defense to a charge under section 2 (a) of the Clayton Act. * * *
>
> On June 7 representatives of the Commission informed you that all of the Commissioners believe that on balance it would be preferable to make the good-faith meeting of competition a complete defense. They endeavored to make clear, however, that the Commission regards the matter as one of selecting the balance of advantage upon a policy question as to which

[8] Hearings before Subcommittee No. 1 of the House Committee on the Judiciary on S. 1008, 81st Cong., 1st Sess., June 8 and 14, 1949. (U. S. Gov't. Printing Office, 1949) p. 61.

> the two sides of the scale are very nearly equal, because whatever choice is made, some competition will be strengthened and other competition weakened. They sought to indicate, therefore, that *the Commission does not strongly urge either view upon the Congress.* * * * [Emphasis supplied.]

The Commission's order herein is based upon its construction and application of the existing law and this order has been unanimously upheld by the Court below. It is therefore submitted that the question of what the law should be is a legislative matter solely for the Congress, that the question before this Court for its decision is the validity or invalidity of the Commission's order under existing law, and that is the only question.

The petitioner contends as a complete justification that the discriminatory prices herein complained of were made in good faith to meet equally low prices of competitors. With respect thereto, the Commission, as reflected by Paragraph Thirteen of its findings, has found that: "Since the record in this case affirmatively shows that the discriminations in price in favor of the named jobbers and in favor of Ned's Auto Supply Company as a tank-wagon purchaser from September 1, 1936, to March 7, 1938, and as a tank-car purchaser thereafter, have resulted in injur-

ing, destroying, and preventing competition between said favored dealers and retail dealers in respondent's gasoline and other major brands of gasoline, the Commission is of the opinion, and so finds, that the defense of meeting an equally low price of a competitor as provided by subsection (b) of section 2 of the Clayton Act is not available to the respondent on the basis of the present record."

The Commission's findings of actual injury to competition are supported by substantial affirmative evidence, and, before this Court, stand unchallenged and uncontradicted. In fact, it would be difficult to conceive a case of price discrimination more clearly in violation of the obvious intent of the Robinson-Patman amendment of the Clayton Act, unless, as contended by petitioner, the "good faith" proviso of Section 2 (b) of the Act is an absolute substantive defense to a charge of violation of Section 2 (a) in any case as a matter of law. Petitioner's contention that this proviso should be so construed and applied is controverted by the legislative history as well as by the language of the proviso.

Prior to June 19, 1936, when the Robinson-Patman Act went into effect, Section 2 of the Clayton Act, 38 Stat. 730 (1914) 15 U. S. C., Sec. 13 (1934), declared discrimination in price to be unlawful where the effect of such discrimi-

nation may be to substantially lessen competition or tend to create a monopoly in any line of commerce, with provisos permitting, among other things, discriminations in price "in the same or different communities made in good faith to meet competition." Under that proviso, proof establishing that a discrimination in price was made in good faith to meet competition may have been a complete substantive defense.

In framing the Robinson-Patman Act, Congress was concerned with the growth of chain stores and the use made of mass buying power to obtain price concessions from sellers greatly in excess of the concessions and allowances granted to their smaller competitors. It was recognized that Section 2 of the Clayton Act permitting discriminations in price in good faith to meet competition was vague, indefinite, and uncertain to such an extent that it was unenforceable in the very cases the statute was intended to reach. Under Section 2 of the original Clayton Act, a chain or other large buyer, merely by finding two or more sellers of like goods willing to grant to him the same preferential price, could obtain an unearned competitive advantage over his smaller competitors and neither the sellers nor the buyer would be subject to prosecution even though the ability of the smaller competitors to compete with the chain or other

large buyer was injured or destroyed by such price discrimination.[9]

In these circumstances, as stated by the Court below, "Congress sought to change this bypass by changing the discriminatory price, made in good faith to meet the low price of a competitor, from a defense, as it then was, to a procedural aid to enable a seller to over-come the prima-facie case made by showing a difference in price to customers in the same community for goods of the same quality."[10]

In the instant case, Ned's Auto Supply Company was engaged exclusively in the retail sale of petitioner's gasoline direct to the consuming public through its own chain of gasoline stations. According to the petitioner's version, Ned's was able to induce other suppliers competing with the petitioner to offer to sell gasoline to Ned's in tank-car quantities at tank-car prices and that the petitioner had to do the same to meet competition regardless of the injurious effects upon competition at the retail level between Ned's and other retailer-purchasers of petitioner's gasoline. In other words, Ned's, although exclusively a retailer, was arbitrarily classified by petitioner as a wholesaler and given wholesale prices which

[9] See Sen. Rep. 1502, 74th Cong., 2d Sess., p. 3; H. Rep. 2287, 74th Cong., 2d Sess., p. 3; Final Report on the Chain Store Investigation, Sen. Doc. No. 4, 74th Cong., 1st Sess.

[10] 173 F. 2d 210 (C. A. 7, 1949).

petitioner did not make available to its other retail customers which resulted in injurious effects upon competition at the retail level. This presents the type of case which Congress found evaded the purpose of the original Clayton Act and also presents exactly the type of case which Congress enacted the Robinson-Patman Act to reach.

The proposal that meeting competition in good faith be made an absolute justification for a discrimination in price otherwise prohibited was considered and rejected by Congress in the enactment of the Robinson-Patman Act. As originally introduced, the Robinson-Patman Act did not contain such a provision. In the Senate, a provision having that effect was proposed as an amendment to the Robinson-Patman bill. 80 Cong. Rec. 6426, 6435. In the House, the Judiciary Committee reported the Bill with the proviso substantially as enacted in Section 2 (b) of the present Act. 80 Cong. Rec. 8139. The Conference Committee rejected the Senate's version and approved the House amendment. The action on the provision was reported by the Conference Committee as follows:

> The Senate bill contained a further proviso: "That nothing herein contained shall prevent discrimination in price in the same or different communities made in

good faith to meet competition." This language is found in existing law, and in the opinion of the conferees is one of the obstacles to enforcement of the present Clayton Act. The Senate receded, and the language is stricken. A provision relating to the question of meeting competition, intended to operate only as a rule of evidence in a proceeding before the Federal Trade Commission is included in subsection (b) in the conference text as follows:

"*Provided, however,* That nothing herein contained shall prevent a seller rebutting the prima facie case thus made by showing that his lower price or the furnishing of services or facilities to any purchaser or purchasers was made in good faith to meet an equally low price of a competitor, or the services or facilities furnished by a competitor."[11]

The Chairman of the House Conferees stated on the floor of the House as he presented the Conference report:

* * * It is to be noted, however, that this does not set up the meeting of competition as an absolute bar to a charge of discrimination under the bill. It merely permits it to be shown in evidence. This provision is entirely procedural. It does not determine substantive rights, liabilities

[11] 80 Cong. Rec. 9414; H. Rep. 2951, 74th Cong., 2d Sess., pp. 6–7.

and duties. They are fixed in the other provisions of the bill. It leaves it a question of fact to be determined in each case, whether the competition to be met was such as to justify the discrimination given, as one lying within the limitations laid down by the bill, and whether the way in which the competition was met lies within the latitude allowed by those limitations.

* * * * *

* * * If this proviso were construed to permit the showing of a competing offer as an absolute bar to liability for discrimination, then it would nullify the Act entirely at the very inception of its enforcement; for in nearly every case mass buyers receive similar discriminations from competing sellers of the same product.

* * *[12]

The Robinson-Patman Act in Section 2 (a) made it unlawful to make a discriminatory price, as theretofore provided in Section 2 of the original Clayton Act, and kept as a defense the cost savings and other defenses of the original Clayton Act, but took out of the defense category the provision for making a lower price to meet competition. As to this, Section 2 (b) of the Robinson-Patman Act provided:

Upon proof being made, at any hearing on a complaint under this section, that

[12] Cong. Rec. June 15, 1936, p. 9418.

there has been discrimination in price or services or facilities furnished, the burden of rebutting the prima facie case thus made by showing justification shall be upon the person charged with a violation of this section, and unless justification shall be affirmatively shown, the Commission is authorized to issue an order terminating the discrimination: *Provided, however,* That nothing herein contained shall prevent a seller rebutting the prima facie case thus made by showing that his lower price or the furnishing of services or facilities to any purchaser or purchasers was made in good faith to meet an equally low price of a competitor, or the services or facilities furnished by a competitor.

In this amendment, it appears to us, as it did to the Court below, that the "intent of Congress is clear and the language used to express its intent, * * * is not ambiguous." Further, we are also of the opinion that this Court has expressed the view that Section 2 (b) is as the Conference Report says it was intended to be in *Trade Comm'n v. Staley Co.*,[13] which reversed the Court below in *A. E. Staley Mfg. Co. v. Federal Trade Commission*,[14] where the Court below had held that the prima facie case had been rebutted.

In the *Staley* case, this Court, speaking through Chief Justice Stone, in part, stated:

[13] 324 U. S. 745 (1945).

[14] 144 F. 2d 221 (C. A. 7, 1943, 1944).

> It will be noted that the defense that the price discriminations were made in order to meet competition, is under the statute a matter of "rebutting" the Commission's "prima facie case." Prior to the Robinson-Patman amendments, Sec. 2 of the Clayton Act provided that nothing contained in it "shall prevent" discriminations in price "made in good faith to meet competition." The change in language of this exception was for the purpose of making the defense a matter of evidence in each case, raising a question of fact as to whether the competition justified the discrimination.

This Court has thus held that the "good faith" proviso of Section 2 (b) does not provide a substantive justification for violation of Section 2 (a); that proof of meeting competition in good faith is sufficient to rebut only a prima facie case of violation of Section 2 (a) and, beyond that, is merely evidence to be considered by the Commission with other evidence in determining as a question of fact in each case whether the seller's competition justified the discrimination in price.

In order to determine whether the meeting of competition justified the discrimination, the Commission must consider the effect of the discrimination as well as the competition met by the seller, since proof that competition was met in good faith is sufficient to rebut a prima facie case.

It follows that, such proof having been made, the Commission can no longer rely upon the inference of injury to competition drawn from the prima facie case and the injurious effect of the discrimination must be affirmatively shown. But when the discrimination is proved by affirmative evidence to have had any of the effects on competition specified in Section 2 (a), the Commission may find on all the evidence that the fact that the seller's lower price was made in good faith to meet its own competition was not sufficient to justify a discrimination in price resulting in substantial injury to competition between its customers at the retail level.

The action of Congress in deliberately taking the "good faith" proviso out of Section 2 of the original Clayton Act, where it was a substantive defense and by transferring it to Section 2 (b), where it was made a procedural section of the Robinson-Patman Act, discloses in itself the intention of Congress to reduce the legal status of the proviso from that of a substantive defense to the status of an evidentiary matter that may or may not be applicable on the merits of a charge of unlawful price discrimination.

There is nothing difficult in construing the application of the procedural provisions of Section 2 (b) if consideration is first given to the several elements of an unlawful discrimination in price under Section 2 (a) of that Act. These

elements may, for convenience, be divided as follows: (1) Jurisdiction, (2) goods of like grade and quality, (3) discrimination in price, and (4) the adverse effects upon competition.

The Court of Appeals for the Second Circuit in *Moss* v. *Federal Trade Commission*,[15] has held in effect that once the Commission has shown that a respondent has charged two prices, Section 2 (b) then shifts the burden of proof to the respondent to prove that the lower price did not have an injurious effect upon competition. This case does not, as we understand it, hold that the "good faith" proviso of Section 2 (b) is a defense to all charges of unlawful price discrimination under Section 2 (a). It holds only that a lower price discrimination made in good faith to meet competition, standing alone, may be a defense. However, in the instant case, the Commission went further and established by affirmative evidence that the petitioner's discriminations in price to the four favored customers did have the effect substantially to lessen competition or to injure, destroy or prevent competition. While it would have been necessary for the Commission to prove only that such discrimination in price may have that effect,[16] the Commission has established in the instant case that petitioner's dis-

[15] 148 F. 2d 378 (C. A. 2, 1944), cert. den. 326 U. S. 734.

[16] *Federal Trade Commission* v. *Morton Salt Co.*, 334 U. S. 37 (1948).

criminations in price have had an injurious effect on competition beyond that required under Section 2 (a) of the Clayton Act, as amended.

The first half of Section 2 (b) provides that "upon proof being made, at any hearing on a complaint under this section, that there has been discrimination in price * * * the burden of rebutting the prima-facie case thus made by showing justification shall be upon the person charged with a violation of this section, and unless justification shall be affirmatively shown, the Commission is authorized to issue an order terminating the discrimination."

This part of Section 2 (b), in the light of the *Moss* and *Morton Salt* cases, clearly means that proof of discrimination in price without proof of the adverse effects specified in Section 2 (a) makes a prima-facie case of unlawful discrimination and that the burden of rebutting the prima-facie case thus made by showing justification shall be upon the person charged with a violation. The word "justification" clearly refers to the substantive defenses made available by the provisos of Section 2 (a) and the provision relative to meeting an equally low price of a competitor in good faith is not included in that section.

The second half of Section 2 (b) states: "*Provided, however,* That nothing herein contained shall prevent a seller rebutting the prima-facie

case thus made by showing that his lower price * * * to any purchaser or purchasers was made in good faith to meet an equally low price of a competitor * * *." Such a showing is not referred to as and manifestly is not intended to be a "justification" for price discrimination. And neither 2 (a) nor 2 (b) provides, as did Section 2 of the original Clayton Act, "that nothing herein contained shall prevent discrimination in price * * * made in good faith to meet competition." It is clear that the effect of the "good faith" proviso of 2 (b) extends only to the matter of "rebutting the prima-facie case," thereby shifting the burden of proof to the Commission on the issue of whether the discrimination has or may have any of the effects specified in Section 2 (a). The Commission must then resolve that issue, not by inference drawn from the mere fact of discrimination in price, but upon all the affirmative evidence, giving due weight to the fact, if proved, that the seller's lower price was made in good faith to meet his competitor's price.

Actually the entire Section 2 (b) is procedural and deals only with the shifting of the burden of proof and the rebuttal of a prima-facie case. Since the term "discrimination in price" was used in connection with the term "the prima-facie case," Congress evidently did not intend the term "discrimination in price" to refer to

all of the elements of unlawful discrimination in price including the effects upon competition as set forth in Section 2 (a). It clearly appears that the term "discrimination in price" as used in Section 2 (b) does not include, and, as held in the *Moss* and *Staley* cases, Section 2 (a) does not require affirmative proof of actual injury to competition when the other elements of an unlawful price discrimination are established. Other interpretations would make Section 2 (b) appear meaningless, for to require affirmative proof of the adverse effects of the discrimination in price upon competition, before the prima-facie case exists, is to make no distinction whatever between proof of a "discrimination in price" as "a prima-facie case" and proof of all of the elements of an unlawful discrimination in price. It is the proof of a "discrimination in price" as that term is used in Section 2 (b) and not proof of all of the elements of an unlawful discrimination in price, as set forth in Section 2 (a), which prima-facie makes the Commission's case. If proof of good faith in meeting an equally low price of a competitor is made, the Commission could no longer rely upon a prima-facie case, but must show by additional and affirmative evidence that the effect of the discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce or to injure, destroy or prevent

competition between the discriminator and its competitors or between customers of the discriminator or with the customers of such customers.

This construction of Sections 2 (a) and 2 (b) we submit correctly and clearly demonstrates that where, as in the instant case, the adverse effects upon competition have been affirmatively established, proof of good faith in meeting an equally low price of a competitor under the proviso of Section 2 (b) does not constitute a substantive justification for the petitioner's discriminations in price. This is particularly true where, as in the instant case, the competition injured is retail competition between competing purchasers, since the fact that the seller acted in good faith to meet the price of the seller's competitor is not inconsistent with, and does not logically rebut, the proof that retail competition between competing purchasers is injured by the discrimination.

Considering further the construction and application of Sections 2 (a) and 2 (b) of the Clayton Act, as amended, the term "good faith" as used in Section 2 (b) presumably means an honest and reasonable belief that the seller is meeting the equally low price of a competitor. By conceding that such belief exists and consequently such good faith, still the question would remain as to whether that proviso is a complete and substantive defense to an otherwise unlawful discrimination.

In considering the issue whether good faith to meet an equally low price of a competitor is a complete justification of a discrimination in price otherwise unlawful under Section 2 (a), some of the analogous concepts of the criminal law may be helpful. Even in criminal law, the accused is presumed to intend the natural and probable consequences of his acts. Moreover, even though a person does not specifically intend the consequences which flow from his acts, he is criminally responsible for them if they are the natural and probable consequences. Therefore, it follows that to give a discriminator under Section 2 (a) complete absolution because he does not specifically intend to injure or prevent competition is to give him a greater freedom from legal responsibility for the consequences of his acts than is found in the criminal law.

Again in criminal law there is a clear distinction between motive and intent. Intent to do the thing that is done is a necessary ingredient of a criminal offense, but, as before indicated, that intent may readily and even conclusively be presumed. But if the thing done be unlawful, good motive is not a justification although it may be relevant in certain cases on the issue of whether the accused actually did the thing with which he is charged.

"Good faith" as used in Section 2 (b) is more analogous to motive than it is to what the criminal law calls intent. In that view of the

matter, Section 2 (b) merely permits the showing of good motives in explanation or in mitigation of the offense charged under Section 2 (a). This seems to be the view of Congressman Wright Patman, who, in discussing the "good faith" proviso of Section 2 (b) in Chapter 3 of his book entitled "The Robinson-Patman Act," stated:

> The Robinson-Patman Act prohibits unfair differentials in the price charged by a manufacturer or wholesaler to his several customers in competition with one another, but provides that if one seller shall meet an equally low price of a competitor in good faith with no subservient intent to circumvent other provisions of the Act, he may cite that fact in mitigation of his violation of other provisions. Some have erroneously interpreted this proviso as one granting the right to discriminate in price to meet competition.
>
> The proviso [in section 2 (b) of the present Act] does not permit price discrimination to meet competition. It does not so state. It merely grants to the accused, in defense of a charge of having violated the Act, the opportunity to offer in rebuttal, as a mitigating circumstance, evidence that he may have engaged in an unlawful discrimination in order to meet competition.

Logically there appears to be no more reason why the good motive of meeting the equally low price of a competitor should be a complete justification than that good motive should be a com-

plete justification in a criminal case. To conclude otherwise is to assume that for some unstated reason the public interest requires the acceptance of justification by motive where injury to competition is involved but requires its rejection where criminal and conventional trespassers on property rights are involved. Again, to conclude otherwise is to assume that the public interest in maintaining a competitive economy is of a lower order of importance than the public interest in protecting society against criminal offenses.

In *United States* v. *Aluminum Co.*,[17] Circuit Judge Learned Hand said with regard to the necessary intent under the Sherman Act that "to read the passage as demanding any 'specific intent' makes nonsense of it, for no monopolist monopolizes unconscious of what he is doing." Judge Hand defines specific intent as "an intent which goes beyond the mere intent to do the act." (Id.) In the same way, it would make nonsense of Section 2 (a) of the Clayton Act, as amended, to interpret it as requiring a specific intent for no discriminator discriminates unconscious of what he is doing, and he is conclusively presumed to be conscious also of its reasonably probable consequences. Legally speaking whatever line of reasoning makes nonsense of Section 2 (a) is, of course, itself nonsense. What then shall be said of a line of reasoning which insists not only that

[17] 148 F. 2d 416, 432 (C. A. 2, 1945).

a specific intent must be read into Section 2 (b) but that when so read it becomes a complete and substantive defense to a violation of Section 2 (a) although 2 (a) requires no intent whatever except to do the act there prohibited and to produce its natural, probable consequences? Such reasoning amounts to saying that Sections 2 (a) and 2 (b) are mutually contradictory and the practical result is that Section 2 (b) would be taken as being paramount to Section 2 (a).

If the words "good faith" as they appear in Section 2 (b) are to be given a subjective meaning by imputing a specific intent then there is nothing to prevent Section 2 (a) from also being given a subjective meaning by imputing a specific intent to injure or prevent competition. This raises the question whether "good faith," as used in Section 2 (b) serves any purpose other than emphasis, although even assuming that the term serves some other purpose, the question remains whether subjective and specific intent shall prevail. If the words "good faith" were not in Section 2 (b), it might be necessary to read them into the language "to meet the equally low price of a competitor." But even though this were necessary, it would merely raise the question whether there was reasonable ground to believe that the discrimination was occasioned by the equally low price of a competitor. Unless there is reasonable ground for such belief, "good faith" in any objective legal sense cannot exist.

So the conclusion is reached that the words "good faith" really add nothing to Section 2 (b) and we must face the question whether the reasonable probability that the discrimination was in order to meet the equally low price of a competitor shall override the reasonable probability under Section 2 (a) that the discrimination will injure or prevent competition. No one would contend that Section 2 (a) requires any specific intent to injure or prevent competition. In this connection, it is well to remember that the "good faith" referred to in Section 2 (b) has no grammatical or logical connection with the acts prohibited under Section 2 (a) but only with meeting the equally low price of a competitor. That is by sharp contrast with Section 2 of the original Clayton Act which provided that "nothing herein contained shall prevent discrimination in price" which was "made in good faith to meet competition." Even then the burden of proof on that question was on the one claiming the benefit of such exemption. So the question obtrudes as to why "good faith" should be read back into Section 2 (a) by interpretation as the substantive defense and complete justification that it once was, after Congress moved it over into Section 2 (b) and gave it the status of a rebutting factor in a prima facie case.

At present, Section 2 (b) merely provides that such "good faith" may be shown in rebuttal of a prima facie case of discrimination. However,

assuming arguendo that this provides a complete justification for a discrimination otherwise unlawful, where does this logically lead? If we apply the elementary principle that a person must be taken to have intended the reasonable consequences of his acts, it follows that if there be a reasonable probability that his price discriminations substantially injure or prevent competition or tend to create a monopoly then he must be taken to have intended such consequences. The fact that such person may also be meeting the equally low price of a competitor cannot logically relieve him of having intended a reasonably probable injury to competition. Possibly this might not follow if that fact were such as to preclude the reasonable probability that he is injuring competition. But obviously the fact that he may be discriminating to meet the equally low price of a competitor does not preclude such a probability.

The logical conclusion from this reasoning is not only that the forbidden injury to competition and good faith to meet an equally low price of a competitor may exist side by side, but that the imputed intent to injure competition may coexist with such imputed "good faith." This poses the ultimate issue whether the public interest in protecting competition against discriminatory pricing shall prevail over an individual seller's interest in discriminating in price in order to meet the equally low price of a competitor. It

is not difficult to see that if the individual seller's interest be held to prevail as a matter of law, then Section 2 (a)'s prohibition of discriminatory pricing becomes largely a nullity and Sections 2 (a) and 2 (b) taken together become for the most part merely a declaration of the individual right to discriminate.

In concluding the discussion of this question, we wish to emphasize that the Commission has not conceded as a fact that petitioner's discriminations in price were in good faith to meet equally low prices of competitors. If it is inferred that the Commission has conceded this fact, such concession must be considered only for the purpose of this decision and not as a concession of actual fact.

The Commission has not considered petitioner's "good faith" as a factual issue and has made no finding of fact thereof. If this issue had been considered, the Commission may well have made a vigorous interpretation of the "good faith" proviso of Section 2 (b). For illustration, the Commission, in passing upon this issue, would undoubtedly have considered, among others, the following: (1) That petitioner granted a preferential price only to those purchasers that petitioner desired to classify as "jobbers"; (2) that competing offers made to Cirrin by certain major oil companies include The Gulf Refining Company and The Texas Company

against whom the Commission has pending charges of unlawful price discrimination[18] in the Detroit Area during the period involved in the instant case; (3) that there is no evidence of any competing offers to Stikeman or Wayne at any time prior to the issuance of the complaint herein; (4) that there is no proof that any of the persons who made alleged competing offers were authorized to act in that capacity, with the exception of offers to Ned's by Red Indian Oil Company, relating to Fleetwing gasoline, a non-major brand; (5) that the majority of alleged competing offers were from non-major companies and in some cases from companies selling unbranded gasoline or companies which had no distribution in Detroit; and (6) that with the exception of the offer by Red Indian Oil Company, there is no proof of any competing offer to Ned's which was open to acceptance in the Fall of 1936 and in March 1938. Again, the Commission may well have considered the objective test of injury as the only practicable way of determining the petitioner's "good faith," since a subjective interpretation of "good faith" would only make that term analogous to such terms as "with a pure heart" or "in good conscience."

[18] *In the Matter of The Gulf Refining Company*, F. T. C. Docket No. 4390; *In the Matter of The Texas Company*, F. T. C. Docket No. 4391.

If this Court should conclude that the Commission erred in its interpretation of Section 2 (b), and that the judgment affirming its order should, therefore, be set aside, this should not result in a decision permitting the petitioner to continue its discriminations in price if, in fact, the petitioner is not in good faith meeting equally low prices of competitors. On the contrary, in that event, it is submitted that the Court should direct that this case be remanded to the Commission for determination of the issue of "good faith" tendered by the petitioner under Section 2 (b).

"Congress has left to the Commission the determination of fact in each case whether the person, charged with making discriminatory prices, acted in good faith to meet a competitor's equally low prices. The determination of this fact from the evidence is for the Commission." *Federal Trade Commission* v. *Staley Manufacturing Co.*[19] In the present case the Commission failed to make such factual determination upon the ground that it was immaterial (R. 5179), because the Commission was of the opinion that under the circumstances of this case the petitioner had violated the statute even if its lower prices had been made in good faith to meet equally low prices of competitors. If the Commission's assumption as to

[19] 324 U.S. 746, 758 (1945).

the law should prove to be unfounded, it is for the Commission, rather than a reviewing court, to determine initially whether the petitioner has sustained the burden of establishing that it is within the proviso of Section 2 (b).

Where the question presented was whether the prohibitions of an order of the Commission exceeded the limits of its discretionary authority respecting relief, this Court held that the courts should not pass upon this question until the Commission had reconsidered the question of relief in the light of a relevant factor which the Commission had not passed upon when the case was before it. *Jacob Siegel Co.* v. *Federal Trade Commission.*[20] *A fortiori,* the cause should be remanded to the Commission where, as in this case, it had concluded that certain conduct was illegal without having made a factual determination material to its ruling as to illegality. *Federal Communications Commission* v. *Pottsville Broadcasting Co.*,[21] Cf., Mr. Chief Justice Taft and Mr. Justice Brandeis "doubting," in *Federal Trade Commission* v. *Curtis Publishing Co.*[22]

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[20] 327 U. S. 608, 613–614 (1946).
[21] 309 U. S. 134, 145–146 (1940).
[22] 260 U. S. 560, 582–583 (1923).

II

SECTIONS 2 (a) AND 2 (b) OF THE CLAYTON ACT, AS AMENDED, MEET ALL REQUIREMENTS OF CONSTITUTIONAL DUE PROCESS WHEN CONSTRUED AS NOT MAKING GOOD FAITH TO MEET AN EQUALLY LOW PRICE OF A COMPETITOR AN ABSOLUTE JUSTIFICATION FOR PRICE DISCRIMINATIONS WHICH INJURE OR DESTROY COMPETITION OR WHICH TEND TO CREATE MONOPOLY

Petitioner contends that the construction of the Commission and of the Court below to the effect above stated cannot be confirmed by this Court without contravening the due-process clause of the fifth amendment to the Constitution. Accordingly petitioner's position is that it has a Constitutionally vested right to discriminate in price when meeting the equally low price of a competitor no matter how much injury may be done to competition. Such a position is equivalent to a contention that the Constitutional power of Congress to regulate commerce among the several states is limited by an inherent and inalienable private right to discriminate in price when done in good faith to meet an equally low price of a competitor. Section 2 (b) as thus construed by petitioner is elevated to the status of a Constitutional guarantee. If that process of elevation is valid, the due-process clause of the Constitution would become a limitation on the Interstate Commerce Clause and on the Constitutional power of Congress to regulate such commerce.

The presumptions against the soundness of such a startling result are of the most cogent character. Where the constitutionality of an act of the legislature is doubtful the courts adopt the principle of resolving those doubts in favor of such presumptions. Only if and when the unconstitutionality of the legislation is clear and palpable do the courts undertake to declare it void under the fundamental law of the land. A corollary to these judicial principles is that in choosing between one construction of the statute which would make it constitutional and another construction which would make it unconstitutional, the courts will invariably choose the former. Of course, we do not suggest that petitioner's construction would make the statute unconstitutional; we have merely insisted that such a construction would make it ineffectual. However, we do suggest that the same considerations which induce the courts to adopt a construction that would make a statute constitutional as against one that would make it unconstitutional should induce them also to adopt a construction that would make this statute an effective rather than an ineffective instrument for protection of the competitive system against injurious discrimination.

The fifth amendment simply provides that "no person" shall "be deprived of life, liberty or property without due process of law." When

petitioner invokes the protection of that amendment it is tantamount to claiming that price discrimination either is a form of freedom of contract which cannot be interfered with by Congress if done in good faith to meet an equally low price of a competitor or that such discrimination is a property right of similar sanctity. But even though price discrimination were to be regarded as a constitutional right, it is protected by the Constitution only against deprivation "without due process of law." We submit that if there be any deprivation of liberty or property here involved it would occur only through due process of law. Congress enacted the Clayton Act and the Robinson-Patman Act pursuant to its plenary and exclusive power to regulate commerce among the several states. It set up an agency to hear and determine the facts concerning price discrimination and to enter an appropriate order to cease and desist whenever such facts showed a violation of the Congressional prohibition. Congress provided for a complete judicial review of such orders on questions of law and a limited review on questions of fact quite similar to that long followed by appellate courts in reviewing the verdicts of lay juries. So far as the process by which petitioner's supposed rights are being challenged it would be difficult if not impossible to provide a process that embodies more complete and equitable protection to

private rights. To support its challenge to the constitutionality of the statute as construed by the Commission and the court below in this case, petitioner must point out some constitutional defect in the process which Congress established for dealing with the problem of destructive price competition in interstate commerce. Otherwise there is no constitutional question but merely one of statutory construction.

For the purpose of making still plainer our position on the constitutional question we are of the opinion that the statute does not approach the limits of constitutional authority to deal with price discrimination in interstate commerce. We believe that if Congress had seen fit to ban all discriminations in price without regard to the effect in a given case, it would have acted within it constitutional prerogative. We believe that if Congress had not seen fit to make due allowance for specified differences in cost a complete justification for price discrimination, it could have omitted such justification from the act without constitutional objection. By the same token it could have transferred the cost defense to Section 2 (b) as it did transfer the good faith defense and thus have made of it merely a rebuttal to a prima-facie case under Section 2 (a). These observations may serve to illuminate the fact that although petitioner's objection is couched in terms of constitutionality, it really

incarnates no more than petitioner's concept of what is good public policy with regard to price discrimination. That concept may be presumed to rest in turn upon petitioner's economic philosophy. In either event the alleged constitutional question resolves itself into the question whether Congress acted wisely and for the general public interest if it actually did what we say Congress intended to do under our construction of the good faith clause of Section 2 (b). No matter how unwisely Congress may be thought to have acted if that construction of the statute be adopted, such lack of wisdom is not unconstitutional. There have been many statutes which the courts have upheld against attack on constitutional grounds despite doubt, disbelief or even disdain on the part of the judges concerning the wisdom of the legislation. All arguments that because the economic effects of our construction would be fundamentally bad or inequitable, Congress did not in fact legislate as the Commission and the Court below say it did, are not relevant on the matter of legislative power. They go only to the matter of legislative intent which is a matter of statutory construction.

To support its contention of unconstitutionality under the fifth amendment petitioner relies heavily if not exclusively on the case of *Fairmont Creamery Co.* v. *Minnesota*.[23] In that case this

[23] 274 U. S. 1 (1927).

Court in an opinion by Mr. Justice McReynolds but with Justices Stone, Holmes, and Brandeis dissenting, set aside a state statute as an encroachment on the liberty of contract protected by the fourteenth amendment because the statute undertook to prohibit discrimination in prices for butterfat paid in different localities by centralized creameries. The fourteenth amendment imposes the same restriction upon the states with regard to deprivation of life, liberty, or property without due process of law that the fifth amendment imposes on the Federal government. The state statute which was set aside in the *Fairmont* case was an amended statute declaring discrimination in prices paid unlawful regardless of the purpose of such discrimination or its effect in destroying competition or creating monopoly. The state explained the reasons for such an amendment by informing the Court as follows:

> In 1923 the legislature amended the law by striking therefrom the ingredient of intent or motive, thus making it an offense to discriminate in prices between localities, except as affected by the cost of transportation, whether done for the purpose of creating a monopoly or destroying competition or not (chapter 120). It was designed to meet and correct the same evils as the old statute. It must be assumed that in the judgment of the legislature the remedy prescribed by the old law was ineffectual to accomplish the de-

> sired results. The State, having found the old law ineffective to prevent the evil because of the almost impossibility of proving by competent evidence that price discrimination between localities was for the purpose of creating a monopoly, determined in its legislative judgment to prohibit discrimination between localities without regard to intent or motive (Id. 2-3).

In his opinion, Mr. Justice McReynolds quoted from the Minnesota Supreme Court opinion which had upheld the amended statute to the following effect:

> A centralized creamery, supplied with ample capital and facilities, has the ability and meets the temptation to destroy competition at a buying station by overbidding, absorbing the resultant losses, if any, through the profits of its general business and, when competition is ended, to buy on a noncompetitive basis. If it does all this successfully, it has a monopoly, and may or may not treat producers justly. The statute seeks to prevent the destruction of competition by forbidding overbidding unless the dealer makes prices at other buying points correspond after proper allowances for the cost of transportation. If the statute is obeyed destroying competition is expensive. The statute limits the right of the creamery to contract at its buying points on a basis satisfactory to itself and its patrons. The

State must concede this, and it does (Id. 7).

This Court further said that "it seems plain enough that the real evil supposed to threaten the creamery business was payment of excessive prices by powerful buyers for the purpose of destroying competition." Nevertheless, the Court held also that "the inhibition of the statute has no reasonable relation to the anticipated evil—high bidding by some with purpose to monopolize or destroy competition." The Court also declared that "buyers in competitive markets must accommodate their bids to prices offered by others," and the payment of different prices in different localities "does not ordinarily produce evil consequences but the reverse," and that the statute prevented "plaintiff in error from carrying on its business in the usual way heretofore regarded as both moral and beneficial to the public and not shown now to be accompanied by evil results as ordinary incidents" (Id. 8–9).

There is reason to believe that the decision and opinion in the above case were not based upon any clear and palpable lack of due process but rather that it was a reflection of the views of a divided court on the economic unwisdom of the state statute which was set aside. The question whether the statutory inhibition had any reasonable relation to the anticipated evil was a question of legislative wisdom and not of legislative power and in any event the opinion itself as above in-

dicated recognized that there was such a relation. Whether the discrimination prohibited by the state statute produced evil consequences or the reverse was likewise a legislative and not a Constitutional or judicial question. Whether the practice or discrimination forbidden by the statute should continue to be regarded by the state as "both moral and beneficial to the public" was definitely within the legislative province.

If the *Fairmont* case be taken as authority for setting aside the amended State statute because of the alleged lack of relation between the evil and the statutory remedy and as authority for concluding that the original statute would not have been set aside because it was limited to discriminations having the purpose and effect of destroying competition or creating monopoly, then Sections 2 (a) and 2 (b) of the statute here involved are distinguishable from the decision in the *Fairmont* case. For the present statute does not prohibit all discrimination in price as the amended Minnesota statute did. It prohibits only such discrimination as injures or prevents competition or tends to create monopoly. It thereby supplies the relation between the evil and the statutory remedy which the Court held was absent in the *Fairmont* case.

The *Fairmont* case appears less applicable as a precedent when viewed in the light of the prior decision of this Court in *Central Lumber Com-*

pany v. *South Dakota*.[24] There the Court in a unanimous opinion by Justice Holmes (who dissented in the *Fairmont* case) upheld the constitutionality of a State statute which prohibited discrimination in price between different communities and sections of the State "after equalizing the distance from the point of production." The Court said:

> We must assume that the legislature of South Dakota considered that people selling in two places made the prohibited use of their opportunities and that such use was harmful, although the usual efforts of competitors were desired. It might have been argued to the legislature with more force than it can be to us that recoupment in one place of losses in another is merely an instance of financial ability to compete. If the legislature thought that that particular manifestation of ability usually came from great corporations whose power it deemed excessive and for that reason did more harm than good in their State, and that there was no other case of frequent occurrence where the same could be said, we cannot review their economics or their facts. That the law embodies a widespread conviction appears from the decisions in other States. *State* v. *Drayton*, 82 Nebraska, 254. *State* v. *Standard Oil Co.*, 111 Minnesota 85; 126 N. W. Rep. 527. *State* v. *Fairmont Cream-*

[24] 226 U. S. 157 (1912).

ery, 153 Iowa, 702; 133 N. W. Rep. 895. *State* v. *Bridgeman & Russell Co.,* 117 Minnesota, 186; 134 N. W. Rep. 496.

The statute involved in the *South Dakota* case prohibited discrimination "intentionally, for the purpose of destroying the competition of any regular, established dealer * * * or to prevent the competition of any person who in good faith intends and attempts to become such dealer" (Id. 159). The statute here involved defines the competitive injury in terms of effect rather than of purpose or intent but such purpose or intent may be inferred if necessary from the elementary principle that one is presumed to intend the reasonable consequence of his acts. While the Minnesota statute by amendment had eliminated purpose as an element of the offense, that can hardly account for the difference in the two decisions. In the *Minnesota* case the Court set the statute aside although saying that it was "plain enough" that the statute was aimed at the evil of payment of excessive prices by powerful buyers for the purpose of destroying competition.[25] In the light of the decision in the *Central Lumber Co.* case, the inference again suggests itself that what the Court thought was unconstitutional in the *Fairmont* case was really nothing more than it thought was bad public policy and unsound economics.

Among the cases cited with approval by this Court in upholding the South Dakota statute in

[25] 274 U. S. 1, 8 (1927).

the *Central Lumber Company* case was *State* v. *Fairmont Creamery Co.* of Nebraska.[26] There the Supreme Court of Iowa had upheld the constitutionality of an Iowa statute quite similar to the Minnesota statute which this Court set aside some fifteen years later. The Iowa Court had made certain observations quite in keeping with those made by this Court in upholding the South Dakota statute as follows:

> The particular methods which are condemned by the legislative act under consideration are set forth therein. It is quite manifest that a company sufficiently large in its capital and in the scope of its business could obtain a monopoly for itself in whatever territory it chose, by adopting the methods which are enumerated and prohibited in the statute. The temporary maintenance of artificial prices for the sole purpose of destroying a weaker competitor and creating a monopoly is one of the modern evil inventions. All that is required for its sure success is that there be great inequality of financial resources in favor of the offending party. A multitude of people buy milk and cream for immediate consumption. Comparatively few buy milk and cream "for the purpose of manufacture." To the multitude who buy for immediate consumption, a monopoly would be quite impossible, and its

[26] 153 Iowa 702.

> attempt quite absurd. But those who buy milk and cream "for the purpose of manufacture" sustain a distinctly different relation to the trade and to the community in which they operate. The magnitude of their operations is limited only by the magnitude of their resources. The motive to monopolize is present as well as the ability to reap its fruits when acquired. In the nature of the case, the discriminations which are condemned in the legislative act are practicable as a practice only to those who engage in the business on a large scale. We are impressed, therefore, that the classification adopted is one which arises quite naturally, and that it rests upon a substantial and practical distinction. Subsequently the same reasoning is applicable to those persons who "buy poultry, eggs, and grain for storage." The argument may require modification in its detailed application to the latter class; but we will not dwell longer upon it. (133 N. W. Rep. 898–899.)

Petitioner characterizes its alleged right to discriminate in good faith to meet an equally low price of a competitor as "a basic right" and one "of first significance in our competitive system." It makes that claim regardless of any adverse effect on competition or tendency to create monopoly. Petitioner even claims this as a basic constitutional right of first significance despite its admission in the same connection that

the lower price which it had met in Detroit was a non-discriminatory price." No matter how plausibly petitioner may state its position in essence it is a bold assertion of a Constitutional right to discriminate in price to meet an equally low price of non-discriminating competitors despite the destruction of such competitors and the death of competition itself which may ensue. It embodies an assertion of the Constitutional right of a business to get bigger and bigger by a process of constantly getting more money per unit of goods from some customers than from others, utilizing the profits from such discrimination to force competitors to follow its price leadership. Except for the intangible subjective halo of good faith it is an assertion of the same right to discriminate in price which the old Standard Oil Company employed so ruthlessly before it was dissolved and because of which Section 2 of the Clayton Act was originally enacted. As the Honorable Louis D. Brandeis said in testifying to the need for such legislation before becoming a member of this Court, price discrimination was the most powerful of all weapons used by Standard except railroad rebates. He said it "would cut the price in the districts where a competitor established himself, and thus destroy him, meanwhile reimbursing himself for the cut in that region by charging high prices

[11] Petitioner's brief supporting Writ of Certiorari, pp. 5, 6.

tinuity of movement" from out of state manufacturer through the wholesaler to the consumer. The Court, speaking through Mr. Justice Douglas, said, at page 567:

> The opinion of the Circuit Court of Appeals is susceptible of the interpretation that such a pause at the warehouse is sufficient to make the Act inapplicable to the subsequent movement of the goods to their intended destination. We believe, however, that view would result in too narrow a construction of the Act.

And again at page 568:

> The entry of the goods into the warehouse interrupts but does not necessarily terminate their interstate journey. A temporary pause in their transit does not mean that they are no longer "in commerce" within the meaning of the Act. As in the case of an agency (cf. *De Leach* v. *Crowley's, Inc.*, 128 F. 2d 378) if the halt in the movement of the goods is a convenient intermediate step in the process of getting them to their final destinations, they remain "in commerce" until they reach those points. Then there is a practical continuity of movement of the goods until they reach the customers for whom they were intended. That is sufficient. Any other test would allow formalities to conceal the continuous nature of the interstate transit which constitutes commerce.

And again at page 569:

> If there is a practical continuity of movement from the manufacturers or suppliers without the state, through respondent's warehouse and on to customers whose prior orders or contracts are being filled, the interstate journey is not ended by reason of a temporary holding of the goods at the warehouse. The fact that respondent may treat the goods as stock in trade or the circumstance that title to the goods passes to respondent on the intermediate delivery, does not mean that the interstate journey ends at the warehouse. The contract or understanding pursuant to which goods are ordered, like a special order, indicates where it was intended that the interstate movement should terminate. Numerous authorities are pressed on us for the contrary view and for the conclusion that when the goods enter the warehouse, they are no longer "in commerce".

And again at page 570:

> We do not mean to imply that a wholesaler's course of business based on anticipation of needs of specific customers, rather than on prior orders or contracts, might not at times be sufficient to establish that practical continuity in transit necessary to keep a movement of goods "in commerce" within the meaning of the Act. It was said in *Swift & Co.* v. *United States*, 196 U. S. 375, 398, that "commerce among the States is not a technical legal conception,

> but a practical one, drawn from the course of business." While that observation was made apropos of the constitutional scope of the commerce power, it is equally apt as a starting point for inquiry whether a particular business is "in commerce" within the meaning of this Act.

And again at page 571:

> The fact that all of respondent's business is not shown to have an interstate character is not important. The applicability of the Act is dependent on the character of the employees' work. *Kirschbaum Co.* v. *Walling*; [316 U. S. 517, 524]. If a substantial part of an employee's activities related to goods whose movement in the channels of interstate commerce was established by the test we have described, he is covered by the Act. Here as in other situations (*Kirschbaum Co.* v. *Walling, supra,* p. 523) the question of the Act's coverage depends on the special facts pertaining to the particular business.

The Clayton Act, as amended, is, like the Federal Trade Commission Act, supplementary to the Sherman Act, and, like the Sherman Act, is designed to protect the public from abuses arising in the course of competitive interstate and foreign trade. Its paramount aim is the protection of the public from evils likely to result from destruction of competition or the restriction of it in a substantial degree. This Act fits into the broad pattern of anti-monopolistic and anti-trust

laws enacted by Congress to protect the general public, and competition, from acts and practices which by their very nature are destructive of that free and open competition which is the life blood of a healthy competitive system such as is essential and necessary to the economic welfare of this country.

The commerce referred to in the Clayton Act should not be examined through the small end of field glasses; and the "in interstate commerce" clause, as used in the Act, is not, and should not be, construed as, a technically phrased tax provision which requires a narrow, strict, legal interpretation; nor should the judicial microscope be so finely adjusted that the field of vision is narrowed and restricted to exclude from consideration all and every element of petitioner's business activities (relating to its distribution of gasoline in the Detroit Area) except those that are plainly obvious and without the least uncertainty, related to the actual transportation and movement of gasoline in *uninterrupted and continuous transit from Whiting, Indiana,* to the gasoline service stations here involved in Detroit. Such technical and microscopic examination would restrict the construction and application of the Act so as to destroy completely its effectiveness, and it would nullify the efforts of this Commission to carry out the will of Congress as expressed by said Act and would open the way for the petitioner and other large corporations

to departmentalize their business, arrange the physical movement of their products so that there would always be a break in the continuity of transit at a warehouse, thus interrupting the interstate movement in the state where the customer is located.

We agree with petitioner that the question presented to this Court is of paramount importance. The interest of the public is vitally concerned, for, if this Court should hold that petitioner's activities as found by the Commission and confirmed by the lower Court, in the sale and distribution of its product were not in interstate commerce, then petitioner would be in a position to claim exemption in every State of the Union in which it does business from the requirements of national legislation against price discrimination in the course of any of its business in commerce.

There are many decisions holding that no such technical concepts of compartmentalized commerce are acceptable. These cases represent a consistent development of the law on what is interstate commerce. The cases at variance with them are but judicial throw-backs to the "horse and buggy" days before gasoline and the automobile did so much to change the concept of commerce from a technical, legal one to a practical one that fits the revolutionized course of modern business.

As this Court said in *Stafford* v. *Wallace*,[40] speaking through Mr. Chief Justice Taft, at page 521:

> * * * Whatever amounts to more or less constant practice, and threatens to obstruct or unduly to burden the freedom of interstate commerce is within the regulatory power of Congress under the commerce clause, and it is primarily for Congress to consider and decide the fact of the danger and meet it. This court will certainly not substitute its judgment for that of Congress in such a matter unless the relation of the subject to interstate commerce and its effect upon it are clearly non-existent.

And at pages 518–519:

> The application of the commerce clause of the Constitution in the *Swift Case* was the result of the natural development of interstate commerce under modern conditions. It was the inevitable recognition of the great central fact that such streams of commerce from one part of the country to another which are ever flowing are in their very essence the commerce among the States and with foreign nations which historically it was one of the chief purposes of the Constitution to bring under national protection and control. This Court declined to defeat this purpose in respect of such a stream and take it out of complete

[40] 258 U. S. 495 (1922).

> national regulation by a nice and technical inquiry into the noninterstate character of some of its necessary incidents and facilities when considered alone and without reference to their association with the movement of which they were an essential but subordinate part.

And, speaking through Mr. Justice Sutherland in *Binderup* v. *Pathe Exchange, Inc.*,[41] at page 309, this Court said:

> If the commodity were consigned directly to the lessees, the interstate character of the commerce throughout would not be disputed. Does the circumstance that in the course of the process the commodity is consigned to a local agency of the distributor to be by that agency held until delivery to the lessee in the same State, put an end to the interstate character of the transaction and transform it into one purely intrastate? We think not. The intermediate delivery to the agency did not end and was not intended to end the movement of the commodity. It was merely halted as a convenient step in the process of getting it to its final destination. The general rule is that where transportation has acquired an "interstate character it continues at least until the load reaches the point where the parties originally intended that the movement should finally end."

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[41] 263 U. S. 291 (1923).

In this connection the Court below aptly stated:

> The modern concept of commerce is one which gives full sweep to the commerce clause of the Constitution within the limits of the implementing statute, a liberal view of the Congressional purpose as expressed in the statute, and a realistic view of what business is doing as it moves across state lines to accomplish its purpose. The late cases support the view that the petitioner's operations are in commerce from the refinery to its customers. *Walling* v. *Jacksonville Paper Co.*, 317 U. S. 564, 63 S. Ct. 332, 87 L. Ed. 460; *Binderup* v. *Pathe Exchange*, 263 U. S. 291, 309, 44 S. Ct. 96, 68 L. Ed. 308; *Mid-Continent Petroleum Corporation* v. *Keen*, 157 F. 2d 310, 314; *Republic Pictures Corporation* v. *Kappler*, 151 F. 2d 543, 545; *Walling* v. *American Stores Co.*, 133 F. 2d 840.

We therefore respectfully submit that the decision of the lower Court is in full accord with this Court's decisions in many cases involving the meaning of the phrase "in interstate commerce" based upon similar or analogous facts.

CONCLUSION

For the reasons stated, the judgment below should be affirmed or, in the alternative, the Court should direct that this case be remanded to the Commission for determination of the issue of "good faith" tendered by the petitioner under Section 2 (b).

Respectfully submitted,

FEDERAL TRADE COMMISSION,
By W. T. KELLEY,
General Counsel.

JAMES W. CASSEDY,
Associate General Counsel.

I hereby authorize the filing of the foregoing brief.

PHILIP B. PERLMAN,
Solicitor General.

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